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No. 509

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IN THE

Supreme Court of the United States

October Term, 1967.

IN THE MATTER OF MELVIN STECKER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES OF AMERICA.

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IN THE

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October Term, 1967.

IN THE MATTER OF MELVIN STECKER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES OF AMERICA.

Petitioner, Melvin Stecker, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the Appellate Division, Superior Court, State of New Jersey, entered January 9, 1963, is not officially reported and appears as part of Appendix A (15). The opinion of the Supreme Court of the State of New Jersey entered on September 16, 1963 is not officially reported and appears as part of Appendix A (18). The opinion of the District Court for the District of New Jersey entered on January 10, 1966 is not officially reported and appears as part of Appendix A (19). The opinion of the United States Court of Appeals for the Third Circuit entered on May 22, 1967 is not officially entered and appears as part of Appendix A (30).

JURISDICTION.

Judgment of the United States Court of Appeals for the Third Circuit was entered on May 22, 1967. The jurisdiction of the Court is invoked under 28 U. S. Code 1254(1).

QUESTIONS PRESENTED.

I. Whether there was sufficient error in the trial of the matter in the State Court to rise to the level of a denial of due process of law to the petitioner.

II. What quantum of trial error in a state court proceeding must be shown before a state court conviction rises to the level of a denial of due process of law to the petitioner,

and thus entitles petitioner to relief through the writ of habeas corpus.

III. Whether the opinion of the courts below is correct, or whether the conflicting view of *U. S. ex rel. Walker v. Foglianni*, 343 F. 2d 43 (9th Cir. 1965), is correct.

STATUTES INVOLVED.

The following statutory provision is set forth as part of Appendix B:

New Jersey Statutes Annotated, 2A:90-2.

The following constitutional provision is set forth as part of Appendix B:

Constitutional Amendment 14, Sec. 1.

STATEMENT.

It should be noted that all references in this petition for certification are to the Appendix filed with the court below and which is on file with this Court as part of the certified record.

Appellant, Melvin Stecker, instituted habeas corpus proceedings on June 18, 1965 by filing his petition with the United States District Court for the District of New Jersey under the provisions of Title 28 U. S. C. Section 2241. At that time, he was in the custody of the Sheriff of Camden County, awaiting commitment to the New Jersey State Prison to serve the balance of a sentence of five to ten years

imposed by the Camden County Court on January 4, 1962 (87a). Sentence was imposed after conviction by a state court jury upon the charge of assault with intent to commit robbery (1a).

Said trial began November 30, 1961 and the jury returned its verdict on December 4, 1961 (82a). Following the sentence, appeal was taken to the Superior Court of New Jersey, Appellate Division. That Court wrote an opinion (96a) and affirmed the conviction on January 9, 1963 (96a). Appellant then applied for a writ of certification to the Supreme Court of New Jersey, which was denied without opinion on September 16, 1963 (100a). Petitioner then attempted to apply for certiorari to the United States Supreme Court, but due to some confusion with out of state counsel, this application was never perfected (105a).

On June 22, 1965, the District Court ordered issuance of a writ of habeas corpus (i). July 7, 1965 was set as the return day of the writ (i). On that date, exhibits consisting of all prior proceedings were submitted to the District Court, argument was had and the court reserved decision. The court denied appellant's request for relief in an opinion filed January 10, 1966 (103a). An order enforcing the opinion was entered on September 1, 1966 (i). A certificate of probable cause was signed on September 26, 1966 (101a) and this appeal follows (102a).

Appellant's basic position is that due to certain things that happened during the course of the trial, which are more fully set forth below, he was denied his federal rights to a fair and impartial trial by a fair and impartial jury. In short, that he was denied due process of law guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution.

At the trial there was testimony as to appellant's involvement in other non-related crimes (17a-19a). There were also certain pictures admitted into evidence which seriously affected the fairness of the trial (18a-19a). The prosecu-

tor also made reference to these other crimes or charges, and his conduct affected the fairness of the trial (72a). These occurrences at trial, singly and cumulatively deprived appellant of a fair and impartial trial, and denied him his constitutional rights, under the due process clause of the Fourteenth Amendment. During the state's case the following transpired:

"Q. On July 1, 1961, did you, as a result of your investigations of this incident, have reason to observe the defendant in this case? A. I did.

Q. Where did you see him on that day? A. Approximately 9 p. m. received a telephone call from Detective DePersia, stated that the ——

The Court: No. As a result of the telephone call what did you do?

Officer Opfer: Met him on Spruce Street between 5th and Broadway, and after meeting him, we went over across the street. And sitting in a car, which was a 1960 Jaguar, was a group of—it had a New York registration—and we arrested Walter Harvey, Melvin Stecker and David Lee Rusher.

By the Prosecutor:

Q. What did you find in that car? A. I myself found a Smith and Wesson Revolver 38 calibre; one set of registration plates Nevada C 55614; one pair of thin pink rubber gloves; one glass cutter; plates with serial number PATS 13086; these articles were found in a brief case inside of the car (17a).

* * * * * * * *

Q. And who were the three men, again, sitting in the car? A. Walter Harvey, who was sitting behind the wheel, Mel Stecker, and David Lee Rusher (18a).

* * * * * * * *

Q. As a result of this investigation, did you find out, did any of these men own this car? A. None of the three men owned the car.

Q. As a result of your investigation, did you determine where Walter Harvey had been previously employed?

A. Walter Harvey had previously been employed at the Sav-Mor Service station at 3144 Westfield Avenue" (19a).

During the trial of the case a mug shot of the appellant was introduced into evidence by the State (18a-19a), along with mug shots of other people with whom he was arrested. These latter individuals were not defendants in the case at all. All three mug shots show the appellant and his two companions, with several days' growth of beard, looking disheveled and extremely dangerous. Once again, this was apparently an effort by the state to show appellant to be a dangerous criminal.

During summation the prosecutor said:

"* * * when Stecker was arrested on July 1, 1961, here in the City in his Jaguar, which neither he owned, nor Harvey—and Harvey is a former employee of Gillespie—and neither Rusher owned, the police found the gun and the license plates as were testified to. And, as was developed on cross-examination, Stecker and Harvey were in no way involved. I was going to say he took the rap, but in any event, Rusher took the full responsibility of owning this gun. Now, remember, Rusher is the man that he came from Baltimore with" (72a).

Thus, the Prosecutor brought the attention of the jury to that which the Appellate Division of the state court said the trial court had taken out of the case.

During the summation, the following also transpired,

"* * * at that time at my cross-examination of Mr. Stecker he said Rusher was a man out on bail on some crime charge in Maryland, and Stecker's explanation is

that under the law of Maryland, and this is a secret section that he knows about, and smilingly says he knows some judges and lawyers don't know about it, he is up here looking for a defendant that jumped bail.

"What is he going to do with him? He is not a police officer. He has no right to stop you or anybody else on the street, if you are a fugitive from the State of Maryland. His obligation, if he knows where somebody is, is to go to the proper authorities. I am a little surprised that he is sitting there and trying to convince you that he was up here looking for somebody.

"(121) Mr. Auerbach: I hate to interrupt. I don't know that I have ever done this, but I don't think Mr. Gretzkowski is in a position to argue the law of Maryland without having it before the Court.

"The Court: Is he arguing the law of Maryland? I think all he did was to quote from what the defendant's interpretation of the law of Maryland was. Of course he has no right to say that is not the rights in Maryland, because the law of Maryland has not been proved. I will so instruct the jury. I think he was quoting from what he conceived to be the testimony given by the defendant as to the proposition of the law of Maryland.

"The Prosecutor: I would presume that the law of the State of ——

"The Court: Don't think on this. Let's not be experting on the law of Maryland. You will have enough trouble with the law in New Jersey.

"The Prosecutor: I am not saying what the law is. I am commenting on the reasonableness of his ——

"(122) The Court: Of what he said. The jury, of course, will fully understand that Mr. Gretzkowski has no right to tell what the law of Maryland is any more than I. I don't think he knows more about the law in

Maryland than do I. He is merely quoting from what he says the law of Maryland is as far as people jumping bail and the rights of the bonding company where a man jumped bail and fled the jurisdiction."

These separate points had a cumulative effect. It is the petitioner's position that the cumulative effect of these various happenings during the course of his state criminal trial raises to the level of a denial of his rights to due process of law under the Fourteenth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT.

I.-II.

The errors specified in the statement of the case individually and in their cumulative effect raise to the level of a denial of petitioner's due process rights.

The testimony introduced at trial about the search of the automobile tended to show that appellant, when arrested had a gun and burglar tools in his possession, while in a stolen car that had phony out of state license tags in it. Thus, he was made out to be a man of many crimes; a professional criminal. Yet, none of this ever resulted in any conviction. It is admitted that a conviction of crime is admissible to effect credibility if the defendant takes the stand. Yet, the authorities are uniform in stating, that absent certain exceptions not here pertinent, such evidence of other crimes or offenses is prejudicial error. See *State v. Sinott*, 24 N. J. 408, 132 A. 2d 298 (1957).

In *State v. Marchand*, 31 N. J. 223, 156 A. 2d 245 (1959), the defendant was charged with arson of her business premises. As part of the state's case, the defendant's statement referring to an earlier fire at another place of business was allowed into evidence. The Court held that this was reversible error since it implied that the defendant was connected with another arson. The court stated that in that case the evidence of a prior crime did not fit in one of the exceptions to the general rule.

In *State v. Dietz*, 5 N. J. Super. 222, 68 A. 2d 777 (App. Div. 1949), the defendant's statement admitted into evidence, read as follows:

> "Q. Do you have any recollection of ever having conducted yourself in a lewd manner with young females? A. No.
>
> Q. Have you ever been questioned by any other police in that respect? A. Yes, by the Totowa Police."

The Court stated that these questions and answers were not within one of the exceptions; that they showed only a predisposition to commit this kind of crime and that their admission was prejudicial error.

In *State v. Nagy*, 27 N. J. Super. 1, 98 A. 2d 613 (App. Div. 1953), the defendant's confession made reference to other crimes, both convictions and arrests. The court held the admission of this material as part of the state's direct case to be reversible error.

A case similar to *Marchand*, is *State v. Cohen*, 97 N. J. L. 5, 116 A. 724 (S. Ct. 1922). There, it was held to be error in an arson prosecution for testimony to be adduced that the defendant had admitted to the witness that he had had a previous fire and had made money out of that previous fire. The *Cohen* case is on direct point with the instant case since the objected to testimony in both cases relates to a prior similar crime, tends to show a propensity towards

that kind of crime and yet is not within any of the exceptions as stated in *Sinott*.

As stated in *State v. Rios*, 17 N. J. 572, 590, 112 A. 2d 247, 257 (1955),

> "Everyone charged with crime has an absolute constitutional right to a fair trial in an atmosphere of judicial calm, before an impartial judge and an unprejudiced jury." The accused "no matter how abhorrent the offense charged nor how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries." *State v. Orecchio*, supra, 16 N. J. at 129, 106 A. 2d at 542.

The Appellate Division of the New Jersey Court treated this same point by saying that the trial judge's remarks had removed the prejudice of this testimony. Yet, a reading of that part of the transcript showed that the judge's remarks were addressed only to the gun, not the alleged burglar tools, the alleged stolen license tags and the alleged stolen car (20a). Even more enlightening was the police officer's answer to the judge's comment, that there was no evidence "at this time" to link appellant with the gun (20a-1, 15). Also, the prosecutor, in summation, made further reference to the prejudicial material which the trial court allegedly removed from the case (72a).

Federal law, in Federal prosecutions is equally clear. In *U. S. v. Jacongelo*, 281 F. 2d 574 (3rd Cir. 1960), the court ruled that a mistrial should have been granted by the trial court where a co-defendant's confession made mention of prior convictions of crime. In *Holmes v. U. S.*, 284 F. 2d 716 (4th Cir. 1960), it was held to be grounds for new trial for both defendants, that a marshal told the jury that one of them was serving a state sentence.

The recent Supreme Court decision, *Spencer v. Texas*, —— U. S. ——, 18 L. Ed. 2d 1607 (1967), is of course clearly distinguishable and in no way applicable since in *Spencer* the allegations of prior criminal offenses were convictions and not merely accusations.

It should also be pointed out that the New Jersey multiple offense statute, N. J. S. A. 2A:85-13 provides for a split trial procedure under which there is one trial on the crime charged and a separate trial for the charge of being a multiple offender.

Thus, for the State to inform the jury of prior convictions of crime by the appellant is a denial of the appellant's right to a fair and impartial trial under the Constitution of the United States. In the case at bar, the criminal conduct referred to as actions of the appellant never resulted in any conviction. A fortiori, his federal rights were violated. Through the testimony of Officer Opfer, the appellant was made out to be a professional criminal in that he had in his possession a gun, burglar tools, counterfeit license plates and a stolen car. None of this alleged criminal conduct ever resulted in any criminal conviction, and in fact, he was indicted only for possession of the gun and this charge was dropped for lack of evidence prior to the time of the trial that resulted in his conviction. Here, the State of New Jersey, did indirectly what it could not do even if appellant were being charged as a multiple offender. This shocking denial of appellant's right to a trial by a fair and impartial jury was sloughed off by the Appellate Division of the New Jersey Courts as being corrected by the trial court judge. A reading of the trial judge's remarks in the form of questions to Officer Opfer will show that this is not so. To allow this conviction to stand would be allowing the State to accomplish indirectly what it could not do directly.

The pictures complained of were treated by the Appellate Division of the State Court as being harmless since, "The

jury probably knew the procedure of photographing persons arrested on charges of crime".

The Appellate Division knows of this procedure, the defense counsel and the prosecutor know of this procedure, but there is no substantial basis for concluding that the jury knows of this procedure. The admission of these photographs only serves to prejudice the petitioner's constitutional right to a fair and impartial trial.

Prejudicial photographs were held to be a possible violation of due process in *Chavez v. Dixon*, 280 F. 2d 727 (9th Cir. 1960). The Court held that if an erroneous ruling on evidence is serious enough it may constitute a denial to the right of a fair trial. Thus, the District Court was ordered to examine the photographs in question. (The District Court's refusal to find the photographs so gruesome as to vitiate due process was upheld in *Chavez v. Dixon*, 300 F. 2d 683 (9th Cir. 1962). See also *Bates v. Dixon*, 226 F. Supp. 983 (N. D. Cal. 1964).

The prosecutor's improper conduct in summation shows that prosecutor did not realize that the trial judge had taken the gun out of the case. Yet, the Appellate Division of the State Court and the Federal District Court said that the gun was no longer considered by the jury after the trial judge's remarks. Prosecutor's argument on the defendant's explanation was, of course, improper. See 8 C. J. S. Sec. 87.

Misconduct of the Prosecutor is grounds for a finding that a defendant's right to a fair trial has been violated and that he is entitled to the writ of habeas corpus. See e.g. *U. S. ex rel. Meers v. Williams*, 326 F. 2d 135 (2nd Cir. 1964).

Thus, in *Pike v. Dickson*, 323 F. 2d 856 (9th Cir. 1963), the denial to the right of fair trial was alleged to be prejudicial misconduct by the Prosecutor during his summation. The Court held that the Federal Court is not bound by a State Court's determination, that these remarks were not

prejudicial, and further held that a full hearing should be held to determine exactly what the Prosecutor did say. The *Pike* case was followed in *Carpenter v. Gladden*, 223 F. Supp. 612 (D. Ore. 1963), where the Court said that misconduct by the Prosecutor in presenting testimony and improperly commenting upon testimony by the jury could vitiate due process by destroying the defendant's right to a fair and impartial trial. Cf. *U. S. ex rel. Birch v. Fay*, 190 F. Supp. 105 (S. D., N. Y. 1961).

The cumulative effect of evidence of other criminal conduct, prejudicial pictures and prosecutor's misconduct denied petitioner his constitutional rights. Each of these matters has been the basis for an explanation by a Federal Court in a habeas corpus context that it would be a denial of substantial provision and would justify issuance of the great writ. Yet, there seems to be no explanation by the Supreme Court of the United States on what level or quantum of trial error is necessary in order to invoke the Federal writ of habeas corpus. Except in clear cut cases, e.g., admission of coerced confessions, on failure to take the stand, etc., the Supreme Court of the United States has not set forth any guide lines on this important question in the administration of criminal justice.

III.

The present decision of the Court of Appeals for the Third Circuit is in conflict with the decision of the Ninth Circuit in U. S. ex rel. Walker v. Foglianni, 343 F. 2d 43 (1965).

In that case, the prosecutor in a state court prosecution told the jury that the defendant had been apprehended in another state's prison. The prosecutor further asked ques-

tions relating to defendant's alleged homosexual proclivities. The case is factually similar, since in the case at bar, the prosecutor told the jury that defendant had been arrested while committing a crime, i.e., possession of a weapon and further testimony was adduced as far as participation in other crimes (possession of a stolen motor vehicle, possession of burglar tools) through the testimony of Patrolman Opfer. In *Foglianni*, the court stated that it was seriously troubled by the tactics of the state prosecutor and reversed.

CONCLUSION.

To establish guidelines as to the quantum of trial error necessary to deny a state court prisoner's federal constitutional rights and to reconcile the differences in the opinion of the Third Circuit in this case and that of the Ninth Circuit in *U. S. ex rel. Walker v. Foglianni*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH J. KMIEC,
Attorney for Petitioner.

APPENDIX "A".

OPINION OF SUPERIOR COURT OF NEW JERSEY.

Argued January 2, 1963—Decided January 9, 1963.

Before: JUDGES CONFORD, GAULKIN and KILKENNY.

MR. STEPHEN F. LICHTENSTEIN argued the cause for appellant.

MR. STEPHEN M. GRETZKOWSKI, JR., Assistant Prosecutor, argued the cause for respondents (MR. NORMAN HEINE, Prosecutor of Camden County, attorney).

PER CURIAM.

Defendant was convicted on an indictment for assault with intent to rob the operator of a gasoline station in Camden on May 22, 1961. The State's case was primarily based upon the direct identification of the defendant by the individual in charge of the station at the time. The defense was an alibi placing the defendant in the area of Baltimore, Maryland, where he resided, at the time of the crime.

Several grounds of appeal argued are asserted by defendant to constitute plain error, no objection having been made at the trial in reference to any of such matters now complained of. We find none of them, singly or collectively, to amount to such serious prejudice to defendant's case as to justify reversal in the light of the evidence as a whole and the lack of objection at trial.

One of the arresting officers testified that the car in which defendant and his companions were found when arrested contained a revolver, Nevada license plates, rubber gloves and a glass cutter. We agree with defendant that eliciting this information was unfair to him. However, we deem the trial judge's express statement, during the cross-examination of the witness, that he, the sitting judge, had previously dismissed a charge against the defendant of carrying a concealed deadly weapon as unwarranted, to have sufficiently neutralized the testimony to preclude a reversal for plain error.

Defendant now complains of the offer in evidence by the State of so-called "mug" photos of defendant and his two companions on the occasion of the arrest, as all three subjects were identified in the pictures as being under apprehension at the time. The exhibits were offered to substantiate the reasonableness of the choice of subjects at the line-up at which the chief witness for the State identified defendant as his assailant. Defendant not only failed to object to the submission of these photos in evidence but affirmatively stated at the trial, through counsel, that he had no objection to them. We find no plain error. The jury probably knew the procedure of photographing persons arrested on charges of crime. There was some degree of justification for the State's buttressing the accuracy of the identification of the defendant at the line-up. *Cf. State v. Orecchio*, 16 N. J. 125, 139 (1954).

Complaint is made of the trial court's charge to the jury concerning the effect of a prior conviction on the credibility of a witness. While the language used was not as carefully articulated as it might have been, we do not agree with defendant that it amounted to an instruction that a conviction necessarily affects credibility. The court stated in effect that the conviction was a circumstance in relation to credibility as to which the jury might "attribute the amount of credibility to which you feel the testimony is entitled." We do not perceive plain error.

Over objection, the court permitted the introduction in evidence of a Camden County motel registration card made up when the defendant stopped there for several days two weeks before the crime here involved. The whole episode involved in relation to this exhibit seems to us so far collateral to the prime factual issue contested at the trial as to lead to the conclusion that introduction of the exhibit subjected defendant to no "manifest wrong or injury." R. R. 1:5-1 (a).

Defendant had explained his presence in the Camden area on other occasions as being in connection with efforts to locate a bail jumper, defendant having been a professional bondsman in Maryland at the time. He assigns error in that the prosecutor in summation impugned this explanation by stating without legal justification that defendant had no right to go into another state to pursue a defaulter on a bail bond. However, upon defendant's objection at that point in the summation that the prosecutor was in no position to "argue the law of Maryland without having it before the court," the trial judge stated that the prosecutor "had no right" to comment on the law of Maryland with respect to this subject without proof of such law and that "the jury of course will fully understand" that fact. In our judgment this was sufficient to overcome the impropriety, if it can be regarded as such. Here, again,

the subject matter objected to was remote from the evidence bearing directly upon defendant's guilt or innocence of the charge against him.

We find no basis for interference with the conviction herein, and it is accordingly

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ MORTIMER G. NEWMAN, JR.,
Clerk.

ORDER DENYING PETITION.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the sixteenth day of September 1963.

/s/ JOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy.

/s/ JOHN H. GILDEA,
Clerk.

OPINION OF UNITED STATES DISTRICT COURT.

APPEARANCES:

For Petitioner, Melvin Stecker: RALPH J. KMIEC, Esq., Camden, N. J.

For Respondent, State of New Jersey: NORMAN HEINE, Esq., Prosecutor of Camden County. By STEPHEN M. GRETZKOWSKI, JR., Esq., Assistant Prosecutor of Camden County.

MADDEN, Chief Judge:

The petitioner, Melvin Stecker, instituted these proceedings on June 18, 1965, by the filing of a petition for the issuance of a writ of habeas corpus under the provisions of Section 2241 of Title 28, U. S. C. At the time of filing, the petitioner was confined in the Camden County Jail under the custody of the Sheriff of Camden County awaiting recommitment to the New Jersey State Prison to serve the balance of a 5 to 7 year sentence imposed by the Camden County Court on January 4, 1962, upon his conviction by jury on an indictment charging him with assault with intent to commit robbery.

In his application, the petitioner alleges he was deprived of his constitutional right to a fair and impartial trial in the Camden County Court in violation of the "due process law" clause of the Fourteenth Amendment of the Constitution of the United States. In support of this allegation, the petitioner alludes to the record of the trial proceedings before the Camden County Court and indicates three instances in the transcript of the trial wherein trial errors or irregu-

larities allegedly occurred. The petitioner contends that these trial errors or irregularities, when considered singularly or cumulatively, are of such magnitude and prejudice that the petitioner was deprived of a fair and impartial trial. This is the sole basis for the petitioner's application and the only federal question raised by the petitioner in these proceedings.

The petition was accompanied by an application for admission to bail pending the return of the writ and a determination of the proceedings by the Court. In his application for bail it appears that the petitioner was arrested on July 1, 1961; that he was released on bail fixed in the amount of $10,000.00 pending and during his trial which commenced on November 30, 1961 and continued through December 4, 1961; that the petitioner was convicted as a result of the trial and remained on such bail until he was sentenced by the Camden County Court on January 4, 1962, whereupon he commenced service of his sentence; that the petitioner filed a notice of appeal on March 26, 1962, and was again released on $10,000.00 bail on the following day, pending the determination of his appeal to the Appellate Division of the Superior Court of New Jersey; that on January 9, 1963, pursuant to an opinion rendered by the Appellate Division, the petitioner's conviction was affirmed; that the petitioner applied for a writ of certiorari to the Supreme Court of New Jersey which was denied on September 16, 1963, during which time the petitioner remained on bail; that the petitioner's bail was continued pending certification to the Supreme Court of the United States by an order entered on October 11, 1963; and that the petitioner remained on such bail until he surrendered himself on June 18, 1965, after it appeared that the petitioner's out-of-state attorney, through some confusion, failed to perfect his application for certification to the Supreme Court of the United States.

On June 22, 1965, this Court ordered the issuance of a writ of habeas corpus, returnable on July 7, 1965[1]; and in the exercise of its discretionary power to admit the petitioner to bail pending the return of the writ, bail was fixed in the amount of $10,000.00.[2] On the same day, a writ of habeas corpus directed to the Sheriff of Camden County was issued and the petitioner was released on bail pending the hearing and determination on the writ.

On the return of the writ, on July 7, 1965, the petitioner appeared through his counsel, and the State of New Jersey was represented by the assistant prosecutor who had tried the case against the petitioner in the Camden County Court and who had argued the matter on behalf of the State on appeal before the Appellate Division of the Superior Court of New Jersey. During the course of the hearing exhibits were introduced into evidence and the arguments of counsel were heard. At the conclusion of the hearing, the decision of the Court was reserved with leave granted to counsel to submit memoranda, and the petitioner was continued on bail until further order of the Court.

Jurisdiction of the matter is readily established under the provisions of Section 2241 of Title 28, U. S. C., which affords this Court with the jurisdiction and power to grant a writ of habeas corpus to a state prisoner held in custody in violation of the Constitution of the United States. *U. S. ex rel. Elliott v. Hendricks*, 213 F. 2d 922 (C. A. 3rd Cir. 1954), cert. den. 348 U. S. 851. The requisite exhaus-

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[1] Upon a preliminary inquiry it was determined that the petitioner's application was sufficient in form and allegation of facts to invoke the jurisdiction of this Court and to warrant the forthwith award of the writ and the hearing thereon under the provisions of 28 U. S. C. 2243. See **Ex parte Royall**, 117 U. S. 241 (1886); **Dorsey v. Gill**, 148 F. 2d 857 (C. A. Dist. of Col., 1945), cert. den. 325 U. S. 890.

[2] See **U. S. ex rel. Ackerman v. Commonwealth of Pennsylvania**, 133 F. Supp. 627 (D. C., W. D. Pa., 1955), and **Johnston v. Marsh**, 227 F. 2d 528 (C. A., 3rd Cir., 1955).

tion of available state court remedies under Section 2254 of Title 28, U. S. C., has been shown. It is well established that under Section 2254 it is sufficient for a state prisoner seeking federal habeas corpus to show that he has appealed unsuccessfully his conviction through the state appellate process wherein he had raised and presented the same federal issue which he raises in his application before the federal district court. Under such circumstances there is no need for the state prisoner to show resort to state post-conviction relief and the full exhaustion thereof since there is either an absence of available state court remedies or circumstances rendering the same ineffective. *Fay v. Noia*, 372 U. S. 391 (1963); *Brown v. Allen*, 344 U. S. 443 (1953); *In re Thompson's Petition*, 301 F. 2d 659 (C. A. 3rd Cir. 1962); *Application of Landeros*, 154 F. Supp. 183 (D. C. N. J. 1957); *Application of Kaufman*, 136 F. Supp. 183 (D. C. N. J. 1955).

The issue presently before the Court was previously raised and presented by the petitioner on his unsuccessful appeal from his conviction to the Appellate Division, and on his application for certiorari to the Supreme Court of New Jersey. While the petitioner did not perfect his application for certification to the Supreme Court of the United States in the course of his appeal of his conviction through the state appellate process, nevertheless, this Court is satisfied that the petitioner did not deliberately by-pass or intentionally waive his right to apply to that Court for certification.[3] Hence, this Court is not precluded under Section 2254 from granting the relief requested by

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[3] The affidavit of the petitioner's out-of-state attorney who formerly represented the petitioner on his application for certification to the United States Supreme Court is before the Court and, uncontroverted, it provides a sufficient basis for this conclusion.

the petitioner should the merits of the issue before the Court be determined in favor of the petitioner. *Fay v. Noia, supra.*

The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty or property without due process of law. In broad terms, "due process of law" assures that "fundamental fairness essential to the very concept of justice." In state criminal prosecutions it secures the accused in those certain basic and fundamental rights which are an integral part of the American system of criminal jurisprudence.

No notion of "due process of law" is more essential to fundamental fairness or more basic to the integrity of a judicial system than the right of an accused to a fair and impartial trial. The "due process" clause of the Fourteenth Amendment demands a zealous observance of this right by the courts of the several states in all criminal prosecutions. Where a state criminal trial is otherwise conducted in disregard of this right, "due process" is offended and the Fourteenth Amendment is operative to render the judgment of the conviction void. *Baker v. Hudspeth,* 129 F. 2d 779 (C. A. 10th Cir. 1942), cert. den. 317 U. S. 681.

In the instant proceedings the petitioner seeks to have the judgment of conviction rendered against him in the Camden County Court declared void. It is the petitioner's contention that he was deprived of his right to a fair and impartial trial in violation of the "due process" clause of the Fourteenth Amendment, and he bases this contention on the alleged commission or occurrence of certain errors or irregularities during the course of his trial. Thus, inquiry is directed to determine whether the petitioner's trial in the County Court was conducted in such a manner as to amount to a disregard of that fundamental fairness essential to the very concept of justice or a denial of fundamental fairness

shocking to the universal sense of justice. *Lisenba v. Califorina*, 314 U. S. 219 (1941); *Chavez v. Dickson*, 280 F. 2d 727 (C. A. 9th Cir. 1960); *Betts v. Brady*, 316 U. S. 455 (1942); *Gideon v. Wainwright*, 372 U. S. 335 (1963).

Generally, the commission or occurrence of such errors or irregularities merely involve issues relating to state law and procedure rather than to federal constitutional issues and are justiciable only on direct appeal rather than on federal habeas corpus proceedings. The proposition has long been established that habeas corpus cannot be utilized as a substitute for appeal or as a writ of error to review such errors or irregularities. *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Frank v. Mangum*, 237 U. S. 309 (1915). It is only under circumstances impugning fundamental fairness or infringing upon specific constitutional protections that federal issues are presented. Trial errors or irregularities which are so prejudicial to an accused's right to a fair and impartial trial as to be clearly a deprivation of his constitutional right under "due process of law" constitute a justiciable federal issue which may be adjudicated on habeas corpus proceedings. *Lisenba v. California, supra; Pike v. Dickson*, 323 F. 2d 856 (C. A. 9th Cir. 1963).

The question before this Court is not whether this Court would have conducted the trial in the same fashion as the state trial court or whether on appeal this Court would view the alleged errors or irregularities as harmless errors as determined by the state appellate court, but whether the alleged errors or irregularities (if they may be regarded as such), either singularly or cumulatively, had the effect of depriving the petitioner of fundamental fairness in a constitutional sense, and, hence, his right to a fair and impartial trial. It is clear that the adjudication of facts relating to the petitioner's claim by the state courts on appeal is not final or binding on this Court in these proceedings, and that this Court is not bound by the state court's con-

clusion that the errors or irregularities were not so prejudicial to the petitioner as to require a reversal. *Brown v. Allen*, 344 U. S. 443 (1952); *Townsend v. Sain*, 372 U. S. 293 (1962); *Pike v. Dickson, supra.*

In determining whether there has been a denial of "due process" on the aforementioned grounds the inquiry on habeas corpus is directed to a review of the entire proceedings and not just to each step and part thereof, for if the total result was the granting of a fair and impartial trial, then the petitioner's constitutional right has not been invaded and the proceedings will not be disturbed. *Abel v. Tinsley*, 213 F. Supp. 784 (D. C. Col. 1962), aff. 314 F. 2d 342, cert. den. 375 U. S. 851.

The first alleged trial error or irregularity asserted by the petitioner was the admission of a portion of the testimony of a police officer who arrested the petitioner and two other individuals in an automobile some thirty-nine days after the commission of the crime for which the petitioner was being tried. During direct examination by the state, and in response to the question of what the officer found in the car, the arresting officer testified that when he arrested the petitioner he found a revolver, Nevada license plates, rubber gloves, a glass cutter and other plates in a brief case inside the car. Counsel for the petitioner urges that such testimony was prejudicial since the assistant prosecutor elicited this testimony despite the fact he knew there was no evidence to connect the articles found to the petitioner or to the crime for which the petitioner was being tried and despite the fact that a concealed weapons charge had been preferred against the petitioner but had been dismissed by the Court with consent of the prosecutor.

Defense counsel made no objection either to the question propounded to the officer or to the testimony elicited, but, rather, attempted to minimize the effect of such testimony during his cross-examination of the officer by showing that

the petitioner did not have possession of the articles found and that the concealed weapons charge was dismissed against the petitioner because of the admission of one of the other individuals arrested that the revolver belonged to him. It was also during this cross-examination that the officer was asked by the Court, if, so far as he was concerned, there was any proof that the petitioner had anything to do with the revolver, and the officer replied, "Not at this time." The petitioner argues that despite the additional statement made by the trial judge that he had previously dismissed the charge of carrying a concealed weapon against the petitioner as being unwarranted, the petitioner was prejudiced by the implication to the jury that the petitioner was involved in criminal activity other than the crime for which he was being tried. The petitioner also makes moment of the fact that the trial judge did not instruct the jury to disregard the testimony regarding the revolver and the other articles found.

In this connection, the petitioner asserts that the assistant prosecutor also made mention of the revolver found by the arresting officer in or during the course of his summation to the jury, inferring that the charge of carrying a concealed weapon was dismissed against the petitioner because another had taken the "rap" or assumed the responsibility.

The second alleged error or irregularity was the introduction into evidence, without objection, of the so-called "mug or rogue's gallery shots" of the petitioner and the other two individuals who were arrested with him. Counsel for the petitioner urges that these pictures which were taken shortly after the arrest have no valid basis for being introduced into evidence and did in fact instill in the minds of the jury the notion that the petitioner and the other two individuals were dangerous criminals, thereby being prejudicial and inflammatory.

These pictures were identified and offered to substantiate the reasonableness of the choice of subjects placed in the line-up at which the petitioner was identified as the assailant by the victim and chief witness of the state. Upon a previous cross-examination of another arresting officer, defense counsel had attacked the reasonableness of the police line-up and elicited the identity and description of the individuals used therein which included the petitioner and the other two individuals depicted in the "mug shots."

The third alleged error or irregularity was the reference made by the assistant prosecutor during the course of his summation to the jury regarding the petitioner's explanation of his presence in the Camden area at or about the time of the crime for which he was being tried. The petitioner on cross-examination stated that he was a professional bail bondsman from the State of Maryland and in the Camden area in an attempt to locate an individual who had fled the jurisdiction of Maryland in violation of his bail bond. The assistant prosecutor impugned the petitioner's explanation by stating that the petitioner as a bail bondsman from Maryland had no right to pursue or apprehend a bail jumper and that he was obliged, if he knew the whereabouts of such a person, to inform the proper authorities. In so many words, the assistant prosecutor implied that the petitioner's explanation could not be believed. Defense counsel objected to the assistant prosecutor's comments on the grounds that the assistant prosecutor had no right to comment on the law of Maryland which was not proved before the court. While the trial judge did not expressly sustain the objection he did preclude the assistant prosecutor from making any comment on the law of Maryland regarding the subject of bail bondsmen and so advised the jury that the assistant prosecutor had no right to comment on the law of Maryland on this point without proof of such law.

While it is most difficult to determine the effect which the alleged errors or irregularities had, singularly or collectively, on the jury and it would only be a conjecture as to the prejudicial ramifications, if any, it does not seem that the three alleged errors or irregularities are so prejudicial in and of themselves as to impair the fairness and impartiality of the trial. Even if these incidents may be considered as errors or irregularities, they do not appear to be of such magnitude as to be a denial of fundamental fairness or shocking to a universal sense of justice. In viewing each incident or occurrence under the circumstances in which they transpired and in light of the entire record of the trial, they do not amount to a denial of fundamental fairness in a constitutional sense.

As to the first alleged error regarding the testimony of the arresting officer and what he found in the car upon the arrest, perhaps it was unfair to elicit such testimony, but certainly the effect of any unfairness was sufficiently minimized and neutralized by the cross-examination of the officer by defense counsel and the statements by the trial judge. As to the introduction of the "mug shots" into evidence, admittedly, such pictures do not depict the petitioner and the others at their best, but it may be assumed that the jury was aware that such photography is a part of police procedure upon arrest of persons charged with crime. The pictures were admitted without objection and on relatively sound grounds to justify their admission into evidence. Finally, as to the comments of the assistant prosecutor upon his summation regarding the petitioner's explanation of his presence in the Camden area on or about the time of commission of the crime, the objection of defense counsel and the subsequent restraint of the assistant prosecutor by the trial judge, together with his statements to the jury, appear to have minimized any possible effect of serious prejudice and impropriety.

Having reviewed the entire record and having considered the alleged trial errors or irregularities, singularly and collectively, in light of the record, this Court cannot state that the petitioner was denied fundamental fairness or a fair and impartial trial. Although this Court may or may not have conducted the trial in the same fashion, or, possibly, viewed the alleged incidents not as harmless errors, it cannot state that an examination of the record leads it to conclude the petitioner did not have a fair and impartial trial as required by the constitutional mandate of "due process of law."

Therefore, the petitioner's application will be denied and the writ cancelled. However, in view of the fact that the petitioner has been released on bail during and pending his appellate proceedings in the state courts, and, also, during and pending this proceeding and determination, the petitioner will be continued on present bail for the further period of thirty (30) days from the date of entry of a final order in this matter to afford the petitioner opportunity to make whatever further applications he may desire.

Counsel will prepare an appropriate Order in accordance with this opinion.

THOMAS M. MADDEN,
Chief Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS.

(Filed May 22, 1967).

Argued May 4, 1967.
Before: STALEY, Chief Judge, and BIGGS and HASTIE, Circuit Judges.

PER CURIAM.

In this habeas corpus proceeding, appellant asserts that he was convicted in New Jersey of assault with intent to commit robbery in violation of the due process of law guaranteed to him "under the Sixth and Fourteenth Amendments to the United States Constitution." Appellant's contention is that alleged trial errors or irregularities, considered singularly or cumulatively, were of such magnitude as to deprive him of his rights to a fair and impartial trial by a fair and impartial jury. This same argument was presented by appellant on an unsuccessful appeal from his conviction to the Appellate Division of the Superior Court of New Jersey, and on his application for certiorari to the Supreme Court of New Jersey. The district court inde-

pendently considered these grounds at a full hearing and rejected appellant's arguments in a well-considered opinion, —— F. Supp ——, with which we are in complete accord. The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B".

Statute:

New Jersey Statutes Annotated, 2A:90-2. *Assault with intent to kill, commit burglary, kidnapping, rape, robbery, sodomy or carnal abuse.*

Any person who commits an assault with intent to kill, or to commit burglary, kidnapping, rape, robbery or sodomy, or to carnally abuse a female under the age of 16, with or without her consent, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $3,000, or by imprisonment for not more than 12 years, or both.

Constitution:

Amendment 14, Sec. 1: "* * * nor shall any state deprive any person of life, liberty or property without due process of law * * *"

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1967.

IN THE MATTER OF MELVIN STECKER,

Petitioner.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

A. DONALD BIGLEY,
Camden County Prosecutor,
Attorney for Plaintiff-Respondent, State of New Jersey,

JOHN P. JEHL,
Assistant Prosecutor,
On the Brief.

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AUTHORITY:

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COUNTER STATEMENT OF FACTS.

It should be noted that all references in this brief are to the Appendix filed with the court below which is on file with this court as part of the certified record.

On May 22, 1961, George Gillespie, the owner of the Sav Mor Service Station, Camden, New Jersey, was assaulted by an armed man attempting to rob the station. On or about July 1, 1961, Gillespie identified petitioner, Melvin Stecker, as his assailant, making the identification from a lineup consisting of petitioner and three other men. The three other men in the lineup were Walter Harvey, David Lee Rusher, both of whom had been arrested with Stecker, and Sonny Gordon, who is not otherwise identified (11a).

In his cross-examination of Officer Troutman, a Camden detective present at the lineup, defense counsel attempted to show that the four men had dissimilar physical characteristics (13a, 14a), thereby raising an inference that the lineup did not present a reasonable choice. Photographs of appellant, Harvey and Rusher, taken after they had been arrested, were introduced into evidence without objection (18a).

John Opfer, the arresting officer, testified that at the time of his arrest, appellant had been sitting in a car with Walter Harvey and David Lee Rusher (28a), and that Walter Harvey had been previously employed at the gas station which had been the scene of the crime for which petitioner was being charged (19a). Officer Opfer further testified that he found petitioner and his two companions in an automobile which contained a revolver, a glass cutter, thin rubber gloves and two sets of license plates (28a). The officer also identified pictures of Stecker and his com-

panions, taken after their arrest, which were admitted into evidence without objection by defense counsel (18a).

On cross-examination the arresting officer testified that petitioner, Harvey and Rusher were all charged with carrying a concealed deadly weapon (19a), but that Rusher pled guilty and the charges against petitioner and Harvey were dropped (19a). The trial judge then added it was he who dismissed the charge against petitioner because the gun belonged to Rusher and that petitioner had nothing to do with the gun (20a). There was no testimony at all linking either petitioner or his companions with the car or any of the other articles found therein.

On cross-examination, petitioner testified that he had been in the Camden area in the early part of May, 1961, looking for a man who had jumped bail in Baltimore, Maryland (53a). In his summation, the prosecutor attempted to discredit this explanation by stating that petitioner had no legal right to be looking for a bail jumper (69a). Defense counsel objected on the ground that the prosecutor could not argue the law of Maryland without having it before the court (69a). The court then cautioned the jury that the prosecutor could not attempt to explain petitioner's rights under Maryland law (69a).

On December 4, 1961, petitioner, Melvin Stecker, was convicted by a jury in the Camden County Court of the crime of assault with intent to commit robbery. Sentence was imposed for a term of five to ten years (87a).

ARGUMENT.

Point I.

The trial errors alleged in the Petition for Certiorari did not deny petitioner due process of law.

Officer Opfer testified that on July 1, 1961, he observed defendant sitting in a car with Walter Harvey and David Lee Rusher (17a), and that the car contained a revolver, a pair of thin rubber gloves, a glass cutter and a set of Nevada registration plates (17a). He also testified that none of the three men owned the car and that Walter Harvey had previously been employed at the gas station which had been the scene of the crime (19a).

Any unfavorable inferences which the jury might have gathered as a result of this testimony was neutralized by cross-examination and statements by the trial judge. On cross-examination, Officer Opfer testified that Rusher plead guilty to the charge of carrying a concealed deadly weapon, stating that it was his and that the charge against Stecker for carrying a weapon was dropped (19a, 20a). At that point, the trial judge added that it was he who dismissed the charge against Stecker (19a). Both the New Jersey Superior Court, Appellate Division, and the United States District Court held that the trial judge's remarks had removed any unfairness arising from the officer's testimony.

While it is true that in the cases cited by petitioner convictions have been reversed because of testimony concerning prior commission of crimes, it must be emphasized that none of these cases are of constitutional dimensions, nor in any of these cases is there the neutralizing effect of a statement by the trial judge explaining that the prior charge was dropped.

A State court decision more closely on point is *State v. Weissman*, 79 A. 2d 748, 73 N. J. Super. 274 (App. Div. 1962), in which a detective testified under direct examination that defendant, when arrested by the police, was carrying a "fully loaded automatic," and during cross-examination made the comment that defendant "had fathered a child" by a girl "he was staying with." The court held that these statements did not have the capacity to bring about an unjust result in view of the fact that defendant later denied the birth of the child and explained the gun was used for protection of his business.

Similarly, in this case, the testimony concerning the gun in the car was properly explained by showing the gun did not belong to appellant, thereby removing its capacity to bring about an unjust result.

It is not disputed that evidence of other crimes should not be admitted except in certain specific instances, however the State respectfully contends that no error was committed in this case because it was clearly demonstrated to the jury that the charge against appellant for carrying a concealed weapon was dismissed. Furthermore, because none of the other contents of the car were attributed by the State to appellant or his companions, it is logical to assume that the jury did not do so either. Finally, there is nothing in the transcript to substantiate appellant's contention that the jury was led to believe these articles were burglar tools or that the car was stolen and it may be added that defense counsel did not object to any of the testimony concerning the contents of the car, nor was there any request for instructions to the jury concerning such testimony.

In *Spencer v. Texas*, 18 L. Ed. 2d 607 (1967), this Court held that the practice of some states in multiple offender cases of reading the defendant's prior criminal record to the jury is not violative of due process. Certainly, if such a practice is not unconstitutional then the testimony in the

present case concerning a charge which the jury was told was dropped along with some mere inferences of other possible criminal conduct cannot be said to be violative of due process.

Petitioner further contends that photographs of himself and his companions, introduced at trial, prejudiced his right to a fair trial.

Petitioner had been identified in a lineup as the guilty party. The lineup consisted of petitioner, the two men with whom he was arrested, and a fourth man. Some question arose on the cross-examination of Officer Troutman as to the fact that the four men in the lineup had dissimilar physical characteristics (12a, 13a, 14a). Photographs of appellant and his companion, taken shortly after their arrest, were admitted into evidence without objection from defense counsel.

Petitioner contends that admission of these photographs, which depicted himself and his companions with several days' growth of beard, gave the jury the impression that he was a dangerous criminal and thus deprived him of a fair trial.

If photographs have a probative value with respect to a fact in issue that outweighs danger of prejudice to defendant, they are admissible and resolution of this question is primarily for the trial court. *Rivers v. U. S.*, 270 F. 2d 435, cert. den. 80 S. Ct. 674 (9th Cir. 1959).

The photographs in this case had probative value on the issue of whether the lineup from which petitioner was identified provided a reasonable choice. Certainly, the jury was well aware of the fact that when persons are arrested these "mug shots" are taken and that such pictures are not intended to be flattering. Furthermore, the jury had an opportunity to observe petitioner at trial so that any opinions drawn as a result of petitioner's appearance would undoubtedly have been made at trial rather than from the photograph.

Therefore, the State respectfully contends that the photograph of petitioner had probative value and was not sufficiently prejudicial to have precluded a fair trial.

Petitioner's final allegation of trial error concerned comments made by the Prosecutor in his summation.

Petitioner had testified on cross-examination that he was a bail bondsman and that he had been in the Camden area early in May looking for a bail jumper (53a). During the course of the prosecutor's summation, the following comments were made:

> "Who was Rusher? At the time at my cross-examination of Mr. Stecker, he said Rusher was a man out on bail on some crime charge in Maryland, and Stecker's explanation is that under the law of Maryland, and this is a secret section that he knows about, and smilingly says he knows some judges and lawyers don't know about it, he is up here looking for a defendant that jumped bail.
>
> "What is he going to do with him? He is not a police officer. He has no right to stop you or anybody else on the street, if you are a fugitive from the State of Maryland. His obligation, if he knows where somebody is, is to go to the proper authorities. I am a little surprised that he is sitting there and trying to convince you that he was up here looking for somebody
>
> "MR. AUERBACH: I hate to interrupt. I don't know that I have ever done this, but I don't think Mr. Gretzkowski is in a position to argue the law of Maryland without having it before this court.
>
> "THE COURT: Is he arguing the law of Maryland? I think all he did was to quote from what the defendant's interpretation of the law of Maryland was. Of course he has no right to say that is not the rights in Maryland, because the law of Maryland has not been proved. I will so instruct the jury. I think he was

quoting from what he conceived to be the testimony given by the defendant as to the proposition of the law of Maryland.

"THE PROSECUTOR: I would presume that the law of the State of ——

"THE COURT: Don't think on this. Let's not be experting on the law of Maryland. You will have enough trouble with the law in New Jersey.

"THE PROSECUTOR: I am not saying what the law is. I am commenting on the reasonableness of his ——

"THE COURT: Of what he said. The jury, of course, will fully understand that Mr. Gretzkowski has no right to tell what the law of Maryland is any more than I. I don't think he knows more about the law in Maryland than I do. He is merely quoting from what he says the law of Maryland is as far as people jumping bail and the rights of the bonding company where a man jumped bail and fled the jurisdiction" (68a, 69a).

Counsel has great latitude in summation and the Trial Court has a large discretion in controlling, permitting and restraining arguments of counsel and in determining the propriety of counsel's argument, C. J. S. Trial, Vol. 88, §169, *Kierce v. Central Vermont Ry.*, 79 F. 2d 198 (C. C. A. Vt. 1935), cert. den. 56 S. Ct. 152.

Any unfairness resulting from the comment of the prosecutor was neutralized by the trial judge who precluded the prosecutor from making any comment on the law of Maryland and advised the jury that the prosecutor had no right to make such comment.

In determining whether there has been a denial of due process, it has been held that the inquiry on habeas corpus is directed to a review of the entire proceedings and not each

separate part and if in the totality the accused received a fair and deliberate trial, no constitutional rights are involved and the proceedings will not be disturbed. *Abel v. Tinsley*, 213 F. Supp. 784 (D. C. Col. 1962), aff. 314 F. 2d 342, cert. den. 375 U. S. 851.

It is submitted that for the reasons stated in the preceding arguments, that none of the alleged errors had the effect, either singularly or collectively, of denying appellant a fair and impartial trial. On each occasion where possible inflammatory or prejudicial matters were brought out in the trial, either defense counsel or the trial judge acted quickly to neutralize such matters. Therefore, viewing the trial in its totality, it is apparent that appellant received a fair and impartial trial.

Point II.

The decision of the Court of Appeals for the Third Circuit is not in conflict with U. S. ex rel. Walker v. Fogliani.

Petitioner contends that this petition should be granted because the decision of the Third Circuit in this case is in conflict with the Ninth Circuit case of *U. S. ex rel. Walker v. Fogliani*, 343 F. 2d 49 (9th Cir. 1965). In that case defendant had applied for a writ of habeas corpus claiming that his conviction in the State court was unconstitutional because he was denied the right to counsel and because of an accumulation of trial errors. The alleged trial errors included a remark by the prosecutor that defendant had been apprehended in another state's prison and questions by the prosecutor to a witness concerning homosexuality. However, the court decided the case solely on the basis of the necessity of having the state court hold proceedings to

examine the issue of denial of counsel. In regard to the alleged trial errors, the court stated, at p. 48:

> "No present purpose would be served by extended and detailed discussion of the second ground of appellant's petition, that in which it is urged that an accumulation of errors in the state trial proceedings resulted in a trial so substantially unfair as to violate federal requirements of due process. Conceding that the contention presents an issue worthy of serious consideration, our meeting it now would overlook the possibility of its elimination by future developments in orderly and proper procedure."

Therefore, it is submitted that petitioner's argument is misleading in attempting to infer that the decision of the lower court in *U. S. ex rel. Walker v. Fogliani* was reversed because of the tactics of the prosecutor when such an inference is totally unsupported by the court's opinion in that case.

CONCLUSION.

On the basis of the aforesaid law and arguments, the State respectfully submits that appellant, Stecker, received a fair and impartial trial and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

A. DONALD BIGLEY,
Camden County Prosecutor,
Attorney for Plaintiff-Respondent, State of New Jersey.
By: JOHN P. JEHL,
On the Brief.

CERTIORARI DENIED